

FEDERAL CIRCUIT COURT OF AUSTRALIA

*NASSAR v MINISTER FOR IMMIGRATION,
CITIZENSHIP, MIGRANT SERVICES AND
MULTICULTURAL AFFAIRS & ANOR*

[2019] FCCA 3091

Catchwords:

MIGRATION – Review of decision by Administrative Appeals Tribunal – whether Administrative Appeals Tribunal’s decision affected by jurisdictional error – whether applicant met requirements of s.5F of the *Migration Act 1958* (Cth) – whether Administrative Appeals Tribunal’s findings were open to it – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 31, 65, 338, 357A, 359A, 359AA, 360, 474,
Migration Regulations 1994 (Cth), regs.1.09A, 1.15A, 2.01.

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
NAFF v Minister for Immigration and Multicultural and Indigenous Affairs
(2004) 221 CLR 1
Randhawa v Minister for Immigration, Local Government and Ethnic Affairs
(1994) 52 FCR 437
Minister for Immigration and Ethnic Affairs v Guo & Anor (1997) 191 CLR 559
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155
Selvadurai v Minister for Immigration and Ethnic Affairs (1994) 34 ALD 347
Abebe v Commonwealth of Australia (1999) 197 CLR 510
Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors (1996)
185 CLR 259
CQG15 v Minister for Immigration and Border Protection (2016) 253 FLR 496
ARG15 v Minister for Immigration and Border Protection (2016) 250 FCR 109
DAO16 v Minister for Immigration and Border Protection [2018] FCAFC 2

Applicant:

SABRY MOUSTAFA DARWISH NASSAR

First Respondent:

MINISTER FOR IMMIGRATION,
CITIZENSHIP, MIGRANT SERVICES
AND MULTICULTURAL AFFAIRS

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:	SYG 450 of 2018
Judgment of:	Judge Emmett
Hearing date:	29 October 2019
Date of Last Submission:	29 October 2019
Delivered at:	Sydney
Delivered on:	29 October 2019

REPRESENTATION

Applicant:

Appeared in person with the assistance of
an interpreter

Solicitors for the Respondents:

Mr Jasper Lambe
(HWL Ebsworth Lawyers)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 450 of 2018

SABRY MOUSTAFA DARWISH NASSAR

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

EX TEMPORE

REASONS FOR JUDGMENT

1. This is an application for judicial review of a decision of for judicial review of a decision of the Administrative Appeals Tribunal dated 22 January 2018 (“**the Tribunal**”), affirming a decision of a delegate of the first respondent (“**the Delegate**”) made on 6 October 2016 refusing the applicant a partner visa.

Legislative framework

2. Pursuant to s.65(1)(a) of the *Migration Act 1958* (Cth) (“**the Act**”), if satisfied of a number of matters, the first respondent may grant a visa.

Section 65(1)(b) of the Act provides that, if the first respondent is not satisfied about those matters, then the Minister must refuse to grant the visa.

3. Section 31(1) of the Act provides that there are to be prescribed classes of visa. One class of visa is a partner visa (reg.2.01 of the *Migration Regulations 1994* (Cth) (“**the Regulations**”) and Schedule 1 to the Regulations).
4. Under s.338 of the Act, a decision to refuse to grant a partner visa is a decision which may be reviewed by the second respondent.
5. The requirements of the natural justice hearing rule are exhaustively stated in Division 5 of Part 5 of the Act (s.357A of the Act). Division 5 Part 5 includes ss.359A and 360, which provide that:

“359A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the Applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

360 Tribunal must invite Applicant to appear

(1) The Tribunal must invite the Applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

6. Section 359AA of the Act permits the Tribunal to give orally to an applicant clear particulars of any information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review. The Tribunal must ensure that the applicant understands the relevance of the information and the consequences of any information being relied upon. The Tribunal must also invite the applicant to comment on or respond to the information and advise the applicant that the applicant may seek additional time to comment on or respond to the information.

7. However, a purported decision of the second respondent which is affected by jurisdictional error is not a decision which is made under the Act and therefore is not a privative clause decision (see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).
8. Clause 801.211(1) – (2) of Schedule 2 to the Regulations sets out the relevant criteria to be satisfied at the time of decision:

“801.22 - Criteria to be satisfied at time of decision

801.221

(1) The applicant meets the requirements of subclause (2), (2A), (3), (4), (5), (6) or (8).

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the holder of a Subclass 820 visa; and

(b) the applicant continues to be sponsored for the grant of the Subclass 820 (Partner) visa by:

(i) the sponsoring partner; or

(ii) the Australian citizen, Australian permanent resident or eligible New Zealand citizen who sponsored the applicant for that visa; and

(c) the applicant is the spouse or de facto partner of the sponsoring partner; and

(d) subject to subclauses (6A) and (7), at least 2 years have passed since the application was (I) made.”

9. (Emphasis added)

10. Section 5F of the Act sets out the definition for ‘spouse’ as follows:

“Spouse

(1) For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.”

11. Regulation 1.15A of the Regulation sets out the prescribed matters that a decision maker must have regard to in determining whether an applicant meets the definition of spouse. The prescribed matters are replicated in reg.1.09A of the Regulations regarding the definition of ‘de facto partner’. Regulation 1.15A of the Regulations is as follows:

“Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."

12. The relevant factual background and the review by the Tribunal are accurately summarised in the first respondent's written submissions as follows:

"Relevant factual background

*2. The applicant is a 48 year old male citizen of Egypt: CB 4. On 27 January 2012, he applied for a Partner Visa (and the temporary version of that visa - a Partner (Temporary) (UK-820) visa (**Temporary Visa**)) on the basis of his married relationship with the sponsor, an Australian citizen: CB 26. The applicant and sponsor were married in New South Wales on 23 September 2011: CB 27, 68.*

*3. The applicant provided material in support of his application (CB46-89) including statutory declarations from third parties and a NSW marriage certificate. Following requests by the (then) Department of Immigration and Border Protection (**Department**) for further information (CB 70, 90), the applicant provided material including bank account statements (CB 96), telephone bills (CB 105), further statutory declarations from third parties (CB 109), photographs of the applicant and sponsor (CB 120), and a residential tenancy agreement (CB 127).*

4. The applicant was granted a Temporary Visa on 15 August 2014.

5. Following the grant of the Temporary Visa, the Department sought further information from the applicant in relation to his application for the Partner Visa: CB 143, 162. He was invited to submit an online application for the Partner Visa: CB 143.

6. The applicant made an online application for a Partner Visa on 4 January 2016: CB 166. As part of that application, the applicant made statements in relation to the financial aspects of his and the sponsor's relationship, the nature of their household,

the social aspects of their relation and the nature of their commitment to one another: CB 173. He also described the development of the applicant and sponsor's relationship: CB 174.

7. On 3 May 2016, the Department wrote to the applicant by email and invited his comment on the following adverse information:

(a) the sponsor did not declare her marital status to Centrelink;

(b) there were inconsistencies in the sponsor's address as between the applicant's Partner Visa application and the details she provided to Centrelink; and

(c) the applicant told the Department that he was divorced from his ex-wife when his Australian marriage certificate said that he had never been validly married.

8. The letter also requested that the applicant provide his divorce certificate and a full extract of the Egyptian family register: CB 192.

9. He sought and was granted an extension of time in which to respond but, after failing to respond within the extended time frame, was not granted: CB 196-199. The applicant did eventually provide a divorce certificate on 1 July 2016.

*10. On 6 October 2016, a delegate of the Minister refused the Partner Visa application: CB 211. The delegate considered the matters prescribed by s 5F of the Migration Act 1958 (Cth) (**Act**) and reg 1.15A of the Migration Regulations 1958 (Cth) (**Regulations**). The delegate was not satisfied that the applicant and sponsor were in a spousal relationship and accordingly refused the Partner Visa on the basis that the applicant did not satisfy cl.801.221(2).*

Review by the Tribunal

11. On 26 October 2019, the applicant sought review of the delegate's decision by the Tribunal: CB 229. The applicant attached a copy of the delegate's decision to his application for review.

12. The applicant appeared before the Tribunal on 7 November 2017 to give evidence and present arguments: CB 280. The applicant was represented by his registered migration agent. The Tribunal also received oral evidence from the sponsor via

telephone. At the hearing, the Tribunal put information to the applicant in accordance with section 359AA (see Tribunal's decision at CB319[11]). The information in question amounted to inconsistencies between the applicant and sponsor's evidence.

13. On 14 November 2017, the applicant's representative provided a submission that sought to explain the inconsistencies identified by the Tribunal at the hearing: CB 285. The representative submitted that the applicant suffered from a medical condition affecting "his overall mental functions in terms of memory". Some further supporting documentation was also provided, being bank statements and telephone bills.

14. On 18 December 2017, the Department issued the applicant, by email to his authorised recipient, with an invitation to comment or respond to information, being statements made by the sponsor at the hearing to the effect that: she does not want another man in her house; she does not want to inform the government that she is in a spousal relationship; and she travels to Lebanon on her own: CB 306.

15. The applicant responded to the invitation to comment by email from his authorised recipient on 5 January 2019: CB 310.

16. On 22 January 2019 the Tribunal affirmed the decision under review and notified the applicant of the same: CB 315.

17. The Tribunal found the applicant and sponsor's evidence at times inconsistent and lacking in credibility: [10]. It did not accept that applicant's explanation for those inconsistencies: [19].

18. Having made these broad findings as to credit, the Tribunal went on to consider each of the matters listed at (a)-(d) of reg 1.15A(3) of the Regulations. The Tribunal was careful to note that it considered each of the sub-paragraphs to paras (a)-(d) of reg 1.15A(3), in accordance with the Full Court's decision in *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41; [2017] FCAFC 206: see Tribunal's decision at [26], [31], [40], [49].

19. In relation to the financial aspects of the relationship, the Tribunal noted the dearth of documentary evidence: [30]. It did not consider the bank account statements provided by the applicant to be indicative of a spousal relationship.

20. In relation to the nature of the household, the Tribunal observed that the applicant and sponsor had agreed to live in

separate house. The Tribunal was of the view that "it is reasonable to expect that the applicant and sponsor when claiming to be in a genuine and continuing relationship would want to live together and share day-to-day living experiences": [34]. The Tribunal also found there to be "little evidence of family support or that the applicant has cared for and supported the sponsor's children in any way during the relationship: [35].

21. In relation to the social aspects of the relationship, the Tribunal noted that the applicant and sponsor travelled separately: [42]. The Tribunal found there to be no convincing evidence before it to the effect that the parties represent themselves as being in a committed spousal relationship or are regarded by others as being in a genuine and continuing relationship.

22. The Tribunal was also not satisfied that the applicant and sponsor are mutually committed to one another: [53].

23. Accordingly, the Tribunal found that the applicant and sponsor are not in a spousal relationship for the purposes of s 5F of the Act, reg 1.15A of the Regulations, and cl 801.221(2)(c)."

The proceeding before this Court

13. The applicant was unrepresented before this Court, although had the assistance of an Arabic interpreter.
14. The applicant read an affidavit affirmed by him on 26 October 2019, annexing various medical reports and information. The applicant made no submission about that material, nor was it provided in support of any application that the applicant made to this Court.
15. The applicant confirmed that he had no other material to give to the Court this morning.
16. The applicant confirmed that on 15 March 2018, he attended a directions hearing before a registrar of this Court. On that occasion, the applicant was provided with the contact details of legal services providers and interpreting and translation services in documents headed in his own language. The applicant was also given leave to file and serve an amended application giving complete particulars of each ground of review relied upon, together with any further evidence by way of affidavit, including any transcript of the Tribunal hearing, as

well as submissions in support. The matter was set down for a callover before me on 13 June 2019.

17. On 13 June 2019, directions were made for the filing and service of submissions by both parties and the matter was set down for hearing today before me.
18. The applicant confirmed morning that he has not filed any document, either in accordance with the orders of the Court or otherwise.
19. At the outset of the hearing, I explained to the applicant that the role of this Court is very different to that of the Tribunal, and that it is not for this Court to reconsider his claims and reach different findings or conclusions. I also explained to the applicant that the only issue before this Court is whether or not the decision of the Tribunal was made according to law. I explained to the applicant that this Court has no power to interfere with the decision of the Tribunal, unless the Court is satisfied that the decision of the Tribunal is affected by a mistake going to its jurisdiction. I further explained to the applicant that disagreement with the findings and conclusions of the Tribunal rarely, by itself, establishes such a mistake.
20. The applicant confirmed that he relied on the grounds contained in the Application filed on 20 February 2018, as follows:

1. Member disregarded a statement made by the sponsor regarding memory. Member had stated in refusal that the sponsor did not mention memory loss but at the time she had said that she couldn't even remember the birthdates of her children let alone the details she was being asked to recall.

2. Member was insensitive about the effects of medications and illnesses that the couple suffered. The decision maker acknowledged that the couple are ill but accused them of fabricating false statements when their issues were supported.

3. Inconsiderate to the unique circumstances and difficulties they suffer due to their age and circumstances when making a decision the member did not acknowledge the difficulty in moving in together and travelling together at their age and point in life especially with the applicant working and the sponsor having children and a knee problem. The member had not appreciated the significance of the agreement that they had made in the

beginning of their relations that considered their unique circumstances and the feels of the sponsors children.

21. Each of the grounds was interpreted for the applicant and the applicant was invited to say whatever he wished in support of each of those grounds.

Ground 1

22. Ground 1 asserts that the Tribunal disregarded a statement by the sponsor regarding her memory.
23. In relation to Ground 1, the applicant said that there was stress and pressure on him, that he could not remember things, although, it was not all the time that he could not remember things. He said he could not remember because of memory problems. He did not directly address the contention in Ground 1 that the Tribunal disregarded a statement made by the sponsor regarding her memory and that the Tribunal stated that the sponsor had not mentioned memory loss; and, that the sponsor said she could not even remember the birth dates of her children, let alone the details she was being asked to recall.
24. At the hearing on 7 November 2017, the Tribunal gave information to the applicant pursuant to s.359AA of the Act in relation to a number of inconsistencies that the Tribunal found existed in the evidence of the applicant and the sponsor and asked the applicant to explain these discrepancies in evidence. The Tribunal identified with particularity the nature of the information that it gave to the applicant for comment. In particular, the Tribunal put to the applicant that when questioned, the sponsor could not remember the applicant's date of birth.
25. On 14 November 2017, the applicant wrote to the Tribunal responding to the various matters that had been put to him by the Tribunal at the hearing pursuant to s.359AA of the Act (“**the Response Letter**”).
26. Under a heading “*The sponsor cannot remember his DOB*” in the Response Letter, the applicant made the statement that during the sponsor’s interview, when asked about her husband's date of birth, she responded that she does not even remember her children’s date of birth.
27. The Tribunal summarised that response by the applicant as follows:

“18. The applicant responded in writing that due to the variety of prescription drugs consumed by the sponsor this would affect her memory and she is more likely to become irritable, dismissive and upset affecting the way she may recall things and that she was also distraught and distracted because she had been informed of the death of a relative. Also stating that the sponsor during the hearing said that she could not remember the date of birth of her own children. Further stating that both the applicant and the sponsor suffer from health disturbances and are on medications that have a significant effect on their mental and physical functions.”

28. The Tribunal accepted that the applicant and the sponsor were on numerous medications but found there was little evidence that both the applicant and sponsor suffer from memory loss. The Tribunal further stated that the sponsor may not remember due to medications that she had taken that could affect her memory. The Tribunal found that the applicant had fabricated the Response Letter in order to vindicate inconsistencies in evidence given by the parties. The Tribunal found that the sponsor did not mention during the hearing that she suffers from memory loss.
29. There is no other evidence before this Court, such as the transcript of the Tribunal's hearing, to suggest that the sponsor gave any evidence of the type asserted by the applicant in his letter dated 14 November 2017.
30. I note that the applicant was directed on 15 March 2018 to file and serve, by way of affidavit, any additional evidence to be relied upon including a transcript of the Tribunal hearing. On that occasion, the applicant was also directed that if either party was to rely on recordings of the Tribunal hearing then notice must be given to the other party and the Court stating the issue to which any part of the recording is relevant and the approximate duration of the relevant recording. There was no such evidence filed or relied upon by the applicant at the hearing.
31. In the circumstances, The Court is entitled to accept the Tribunal's decision record as accurately reflecting the matters to which it refers as taking place at the hearing in the absence of any evidence to the contrary (*NAFF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1).

32. In any event, the Tribunal was aware that the applicant had asserted that the sponsor suffered from memory loss. In light of the Tribunal's clear statement that the sponsor did not mention during the hearing that she suffers from memory loss, Ground 1 does not identify a jurisdictional error.
33. Accordingly, Ground 1 is not made out.

Ground 2

34. Ground 2 asserts that the Tribunal was insensitive about the effects of medication and illnesses that the applicant and the sponsor suffered from. Ground 2 takes issue with the Tribunal's finding that statements relating to medications and illnesses were fabricated and false.
35. The applicant was invited to say whatever he wished in support of Ground 2 and the applicant said that he did not fabricate anything, that all his documents were true, and that the applicant also said, "*If this does not help me, help us remember.*" I do not understand what the applicant meant by that submission. I take the applicant's submission to be that he was upset by the finding of fabrication.
36. However, a fair reading of the Tribunal's decision record makes clear that the Tribunal noted that at the start of the hearing the applicant complained that he had a headache and was not feeling well. The Tribunal told the applicant that if he needed a break at any time, he could inform the Tribunal. The Tribunal found the applicant to be coherent and that he did not complain about his wellbeing or headaches during the hearing. Nor did he have any difficulty responding to questions or dealing with the interpreter. The Tribunal stated in its decision record that it continued to monitor the applicant's condition and noted that the applicant raised no issues concerning headaches or his health during the hearing.
37. The Tribunal accepted that the applicant was being treated for medical conditions that he identified but found that the applicant obtained the medical certificate after the Tribunal hearing to alleviate the Tribunal's concerns about inconsistencies in his evidence. Further, the Tribunal found that if the applicant was sincerely concerned about his health on

the day, he would have requested that the hearing be held at another time.

38. The Tribunal's finding that the applicant fabricated part of the Response Letter was based on the statement referred to by the applicant that the sponsor said that she could not remember her children's date of birth. The Tribunal found that the sponsor did not mention during the hearing that she suffered from memory loss. That was the only finding of actual fabrication of evidence made by the Tribunal.
39. Otherwise, the Tribunal found that the applicant and sponsor were not credible and that their evidence at times was not plausible or commensurate with a couple in a genuine, continuing spousal relationship.
40. It is well established that the Tribunal is not required to accept uncritically any and all claims made by an applicant (see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451 per Beaumont J; *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559 at 596 per Kirby J; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-70 per Wilcox J). Nor does the Tribunal have to possess rebutting evidence before holding that a particular assertion was not made out (see *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347 at 348 per Heerey J).
41. The Tribunal found that given the parties had been married for a period exceeding six years, the evidence provided in support of the genuine spousal relationship was limited and very inconsistent with the claimed duration of being in a marital relationship. As stated above, the Tribunal accepted that the applicant was being treated for his medical conditions.
42. In the circumstances, Ground 2 does not identify any jurisdictional error on the part of the Tribunal and appears more to be a disagreement with the findings and conclusions of the Tribunal. The applicant's complaints, such as they are, invite merits review which this Court cannot undertake (see *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at 53-54 per Gleeson CJ and McHugh J; *Minister for*

Immigration and Ethnic Affairs v Wu Shan Liang and Ors (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ).

43. The findings of the Tribunal were open to it on the evidence and material before it and for the reasons it gave. The findings were probative of the issues before the Tribunal and they were made on a procedurally fair basis where the applicant was given information at the hearing about matters of concern that the Tribunal had about his evidence and the applicant was given an opportunity to respond in writing, which the applicant did.
44. It is well established that credibility findings are matters for the primary decision-maker, provided they are open on the material, based on rational grounds and arrived at after consideration of matters that were logically probative of the issue, and made in a procedurally fair manner (see *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FLR 496, 507-9, [36]-[38]; *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109, 130-131 [83] (“*ARG15*”); *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2, [30])
45. In the circumstances, Ground 2 does not demonstrate jurisdictional error on the part of the Tribunal.
46. Accordingly, Ground 2 is not made out.

Ground 3

47. I understand Ground 3 to assert that the Tribunal was inconsiderate in relation to the difficulties the applicant and the sponsor suffer due to their age, the difficulty they have in moving in together and travelling together at their age, especially with the applicant working, and, the sponsor having children and a knee problem. Ground 3 also asserts that the Tribunal did not appreciate the significance of the agreement that the sponsor and the applicant had made at the beginning of their relationship, and that the Tribunal failed to have regard to the feelings of the sponsor's children.
48. The applicant said only that he had lodged everything and that he did not understand what was meant by Ground 3.

49. I then asked the applicant: “*What do you wish to say about the errors that the Tribunal made?*” The applicant responded that he was sick and that the Tribunal did not take into consideration his health problem, particularly remembering things.
50. As is plain from these reasons in relation to Ground 1 and Ground 2 above, the Tribunal did take into consideration the applicant’s health problems and accepted them.
51. The Tribunal put to the applicant that the sponsor stated that her children did not want another man in the house and noted the applicant's response. When the parties started their relationship, the sponsor was living with her four unmarried children in a three bedroom house and there was no space for the applicant, and they had an agreement to live apart, having regard to the space needed for the children.
52. The Tribunal noted that the Response Letter stated that there were currently two unmarried sons aged 18 and 29 living with the sponsor and her other married children visit the sponsor with their children, and the house is always full.
53. The Tribunal also noted that the Response Letter stated that the parties could not combine their lives due to the factor of space and that they would live together when all the sponsor's children got married. The Response Letter stated that the parties understand and have agreed to this arrangement.
54. In relation to the Response Letter, the Tribunal accepted that the sponsor’s children live with her and that she cares for them. However, the Tribunal did not accept that the applicant could not live with the sponsor in her home. The Tribunal referred to evidence that the sponsor lived in a three bedroom house and at the time of the Tribunal hearing two of her adult children resided in the home with the sponsor. The Tribunal found that it was reasonable to expect that the applicant and sponsor, when claiming to be in a genuine and continuing relationship, would want to live together and share day to day living experiences.
55. In relation to the parties’ agreement to live separately, the Tribunal accepted that they had such an agreement but found there was little

evidence of family support or that the applicant has cared for or supported the sponsor's children in any way during the relationship or that they would genuinely live together anytime in the future.

56. On the evidence before it, the Tribunal was not satisfied that the relationship was a genuine and continuing relationship. Ultimately, the Tribunal found that overall the evidence given by the applicant and the sponsor was insufficient to support a finding that they are sharing a household or the responsibilities of the household. Based on the lack of evidence provided by the parties, the Tribunal was not satisfied that the oral or documentary evidence presented by the applicant and sponsor in relation to the nature of the household supported the existence of a genuine and continuing relationship.
57. Ultimately, the Tribunal was not satisfied that at the time of decision the sponsor and the applicant have or ever had a mutual commitment to a shared life as spousal partners to the exclusion of all others, that their relationship was genuine and continuing and that they do not live separately and apart on a permanent basis.
58. The Tribunal found that the applicant therefore does not meet the requirements of s.5F of the Act.
59. Those findings were also open to the Tribunal on the evidence and material before it and for the reasons it gave, including its adverse credibility findings. The Tribunal's findings were based on rational grounds and arrived at after considering factors that were logically probative of the issues of credibility. They were not tainted by any failure to afford procedural fairness and were not without an intelligible justification (see *ARG15* at [83] per Griffiths, Perry, Bromwich JJ).
60. In the circumstances, Ground 3 is not made out.

Conclusion

61. The Tribunal complied with the statutory regime in the conduct of its review and the preparation of its statement of decision and reasons. The Tribunal identified the claims of the applicant and heard from both the applicant and the sponsor at a hearing.

62. As stated above, the Tribunal put information that caused it concern to the applicant for comment and allowed the applicant time following the hearing to address those issues in writing.
63. The Tribunal made comprehensive findings in relation to whether the parties are in a spousal, considered whether the requirements for spousal relationship were met, had regard to the financial aspects of the relationship, the nature of the household, and the social aspects and commitment of the parties to each other.
64. A fair reading of the Tribunal's decision record makes clear that the Tribunal understood the claims being made by the applicant; explored those claims with the applicant at a hearing; and, had regard to all material provided in support. The Tribunal put to the applicant matters of concern it had about his evidence and noted the applicant's responses, both oral and written.
65. The Tribunal made findings based on the evidence and material before it which were open to it and reached conclusions based on the findings made by it and to which it applied the correct law.
66. In the circumstances, the Tribunal complied with its obligation under the statutory regime in the making of its decision, including the conduct of its review.
67. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no power to interfere.
68. The proceeding before this Court should be dismissed with costs.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Deputy Associate:

Date: 31 October 2019